

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 8**

**THE AMERICAN BOTTLING COMPANY,
INC., D/B/A DR PEPPER SNAPPLE GROUP**

and

CASE NO. 8-CA-39327

**TEAMSTERS LOCAL UNION NO. 293
A/W THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Charging Party**

and

**TEAMSTERS LOCAL UNION NO. 348,
A/W THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Party to the Contract**

and

**TEAMSTERS LOCAL
UNION NO. 1164 A/W THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,
Party of Interest**

**EXCEPTIONS OF COUNSEL FOR THE ACTING GENERAL COUNSEL
AND BRIEF IN SUPPORT**

Counsel for the Acting General Counsel Sharlee Cendrosky excepts to the following finding of facts and conclusions by Administrative Law Judge Jeffrey D.

Wedekind on pages twenty (20) and twenty-one (21) in his Decision and Order issued in this matter on August 12, 2011 (JD-46-11).¹

The ALJ erred by denying Counsel for the Acting General Counsel's request for additional remedies and by finding that the Board's standard remedies were sufficient. Specifically, the Counsel for the Acting General Counsel excepts to the ALJ's denial of the Acting General Counsel's request that Respondent be ordered to:

(1) read the notice to employees or allow a Board agent to do so in the Respondent's presence; (ALJD, pp. 20-21)

(2) provide Locals 293 and 1164 with reasonable access to bulletin boards and non-work areas during non-work time; and, (ALJD, pp. 20-21)

(3) provide equal time and facilities to respond to any address the Respondent makes to employees regarding union representation. (ALJD, pp. 20-21)

In addition, Counsel for the Acting General Counsel excepts to the ALJ's failure to order that the Notice to Employees in this matter be mailed to the merchandisers. (ALJD, p. 21, fn. 28)

BRIEF IN SUPPORT OF EXCEPTIONS

In denying the request for additional remedies, the ALJ asserted that Counsel for the Acting General Counsel failed to present any persuasive reasons or authority to support issuing such remedies in the circumstances of this case. (ALJD, p.20) The ALJ maintained that the supporting cases cited by the Acting General Counsel have nothing in common with the facts and circumstances at issue. (ALJD, p.20) While it is true that the cases cited by Counsel for the Acting General Counsel are not on all fours with the case

¹ Hereinafter, Judge Wedekind will be referred to as "ALJ". ALJD, p.____ will indicate the page in the ALJ's Decision, JD-46-11.

at hand, as explained more fully below, these cases are nonetheless relevant as they illustrate the remedies needed to protect employee free choice, which is the crux of the violations in this case. Contrary to the ALJ's findings, the remedies sought are needed to create an atmosphere free from the effects of the underlying unfair labor practices and they are appropriate given the serious nature of Respondent's unlawful conduct.

With respect to the notice-reading remedy, the ALJ dismissed any reliance on the case cited by the General Counsel, *Federated Logistics*, 340 NLRB 255, 258 fn.11 (2003), because *Federated Logistics* involved numerous 8(a)(1) and (3) violations during an initial organizing campaign. (ALJD, p. 20) Although the present case did not involve an initial organizing campaign, it did squarely present a question concerning representation. At issue was how employees previously represented by three distinct unions would be represented in the future given the consolidation of what had been separate business locations. This case involves the Respondent's unlawful assistance to and recognition of one of those unions. Thus, while the instant case does not entail an initial organizing campaign, it does involve representational issues as well the Respondent's unlawful interference with employees' representational rights. Counsel for the Acting General Counsel submits that this is a factual distinction without a substantive difference and that a notice-reading remedy clearly is needed to assure Respondent's employees that their organizational rights will be respected in the future.

Counsel for the Acting General Counsel submits that the effect of unlawful assistance and recognition of a rival union has the same serious impact on employee free choice as an initial organizing campaign. That is, in both instances, employees are stripped of their right to self-organize through representatives of *their* own choosing.

Here, Respondent's employees were never given a choice as to which union, if any, they wished to have as their collective bargaining representative as Respondent made this choice for them. Moreover, sales representative employees who enjoyed union representation and contract benefits at Respondent's Maple Heights facility were stripped from the unit altogether, while merchandiser employees who previously were not represented by a union were unilaterally placed in Respondent's newly created unit. It should be self evident that this conduct has every bit the same lasting coercive impact on employees as threats, unlawful grants of benefits or surveillance traditionally found in initial organizing campaigns.

In all organizing cases, the remedial touchstone is effective relief to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 rights to make an uncoerced choice regarding unionization. A notice reading to the assembled employees by a responsible official of the Respondent affords the Board's notice "the imprimatur of the person most responsible and allows employees to see that the respondent and its officers are bound by the Act's requirements." *Loray Corp.*, 184 NLRB 557, 558 (1970). A notice-reading remedy is more effective at remedying violations than a traditional notice posting because of its heightened psychological impact on employees; "for an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve." *Teeter*, Fair Notice: Assuring Victims of Unfair Labor Practices that their Rights will be Respected, 63 UMKC L. Rev 1, 11 (Fall, 1994). Simply put, this remedy is needed to reassure Respondent's employees that they truly

have free choice in selecting which of the unions, if any, they wish to have as their collective bargaining representative.

In denying the second remedy, access and a right to address employees, the ALJ noted that no direct evidence was presented to show that employees have abandoned their support for Local 293 and 1164, or that there has been any significant turnover in the seven months since the unlawful recognition and assistance to Local 348. Counsel for the Acting General Counsel respectfully submits that in this connection the ALJ simply failed to draw entirely reasonable and appropriate inferences that should have been drawn based on any fair appraisal of the circumstances of this case. Indeed, the U.S. Court of Appeals for the Ninth Circuit recently issued a decision in *Frankly v. HTH Corp.*, ___ F.3d ___, No. 10-15984, 2011 WL 3250637 (9th Cir. 2011) that squarely stands for the proposition that it is appropriate to make reasonable inferences regarding the effects of unremedied unfair labor practices based on the nature of the conduct at issue. Given the Respondent's unlawful grant of recognition and a contract to Local 348, it is appropriate and self-evident to infer that employee support for Local 293 and Local 1164 has eroded and will continue to erode before the Board issues a final order in this matter.

Moreover, Respondent granted access to Local 348 and permitted its representatives to speak with Respondent's employees about the benefits of being a member of their union, passed out Local 348 union authorization cards, and posted Local 348 membership meeting information at Respondent's facility. Allowing the two other unions access to the Respondent's bulletin boards and non-work areas during non-work time will assist the employees in hearing the unions' message in an atmosphere free of the restraint or coercion generated by the Respondent's unlawful conduct. *Jonbil, Inc.*,

332 NLRB 652 (2000); *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (D.C. Cir. 1981). Indeed, when an employer, such as Respondent, has unlawfully interfered with the relationship between employees and a union, the impact of that interference requires a remedy that will ensure free and open communication. *John Singer, Inc.*, 197 NLRB 88,90 (1972) (union access to bulletin boards necessary because additional forms of communication were needed to allow the union to reclaim allegiance lost as a result of the company's unlawful conduct). Additionally, and importantly, because Respondent held multiple captive audience meetings with its employees and permitted Local 348 to discuss the benefits of union membership and distribute union membership cards, the additional remedy of allowing Locals 293 and 1164 access to non-work areas during employees' nonwork time will serve to counterbalance the access that Local 348 had enjoyed as the unlawfully recognized exclusive representative since January 14, 2011. See *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995)(nonwork access, equal time, and a thirty minute pre-election speech appropriate because managers gave numerous unlawful captive audience speeches).

Finally, although not requested in its Brief, Counsel for the Acting General Counsel, excepts to the ALJ's failure to order that the Notice to Employees in this matter be mailed to the merchandisers. (ALJD, p. 21, fn. 28) As noted by the ALJ, the record indicates that Respondent's merchandiser employees work 95 percent of the time in the field and do not come to Respondent's facility as regularly or frequently as other employees. (ALJD, p. 21, fn. 28) For this reason, Counsel for the Acting General Counsel believes that the Notice to Employees in this matter should be mailed to the merchandiser employees. *California Gas Transport, Inc.*, 347 NLRB 1314, 1362 fn. 64

(2006)(Notice mailing is necessary as the testimony of various witnesses indicated that the drivers often do not go to Respondent's respective facility in El Paso or Nogales for long periods of time).

Accordingly, it is respectfully requested that the Board reverse the Administrative Law Judge's conclusion that the Board's standard remedies are sufficient and instead find that the additional remedies sought by Counsel for the Acting General Counsel are appropriate. Counsel for the Acting General Counsel requests that the Board revise the ALJ's recommended Order and Notice to conform to the exceptions set forth above.

Dated at Cleveland, Ohio, this 9th day of September 2011.

/s/ Sharlee Cendrosky

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PROOF OF SERVICE

Copies of the foregoing Brief of Counsel for the General Counsel were sent to the following individuals by electronic mail on September 9, 2011:

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